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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Murray Hooper,) No. CV 98-2164-PHX-SMM

10 Petitioner,) DEATH PENALTY CASE

11 vs.)

12) **ORDER**

13 Dora B. Schriro et al.,)

14 Respondents.)

15 _____)

16 Petitioner moves for leave to amend his habeas petition to add Claim 16, which he

17 advises has been exhausted through the state courts pursuant to this Court's stay of

18 proceedings. (*See* Dkt. 102, 32.) Petitioner further requests that the Court establish a merits

19 briefing schedule for Claim 16. (Dkt. 102.) Respondents have neglected to respond to

20 Petitioner's motion. At this juncture, it is unclear whether Claim 16 should be re-added to

21 the amended petition because amendment may be futile. Therefore, and because the instant

22 motion fails to address the standard for amendment, the motion is denied without prejudice

23 to refile.

24 **DISCUSSION**

25 Petitioner, William Bracy and Edward McCall were convicted in Arizona state court

26 of the Redmond/Phelps homicides. *State v. Hooper*, 145 Ariz. 538, 703 P.2d 482 (1985);

27 *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985); *State v. McCall*, 139 Ariz. 147, 677 P.2d

28 920 (1983). Petitioner and Bracy were tried together and both were sentenced to death in

1 February 1982. At sentencing, the state court found the existence of Arizona's (F)(1)
2 aggravating factor – that the defendant had been convicted of an offense for which a sentence
3 of life imprisonment or death was imposable, A.R.S. § 13-703(F)(1) – based on Petitioner's
4 1981 triple-homicide conviction in Illinois. *See Hooper*, 145 Ariz. at 550, 703 P.2d at 494.

5 In Claim 16, Petitioner alleged that his Arizona death sentence is unconstitutional
6 because it rests, in part, on an invalid murder conviction in Illinois. Petitioner sought, and
7 this Court granted, leave to return to the Arizona state courts to assert newly-discovered
8 evidence concerning the validity of his Illinois murder conviction; specifically, that his trial
9 judge, Cook County Circuit Court Judge Thomas Maloney, was subsequently convicted for
10 taking bribes regarding criminal cases (“the Maloney Claim”).¹ (Dkt. 29 at 9, Dkt. 31 at 59.)
11 Upon initial review of Petitioner's amended petition, the Court determined that Claim 16 was
12 unexhausted because it appeared Petitioner had a remedy in state court to pursue the claim.
13 (Dkt. 32.) This rendered Petitioner's habeas petition mixed pursuant to *Rose v. Lundy*, 455
14 U.S. 509, 510 (1982).² Petitioner withdrew Claim 16 (dkt. 34), and this Court stayed his
15 habeas petition pending the outcome of state post-conviction proceedings (dkt. 32).

16 Subsequently, Petitioner initiated Arizona post-conviction relief (“PCR”) proceedings
17 on his Maloney Claim. The Arizona PCR court stayed those proceedings while Petitioner
18 sought post-conviction relief in Illinois. (Dkt. 102.) Although the Illinois proceedings are
19 still ongoing, at some point the Arizona PCR court lifted the stay and denied relief. (*Id.*) The
20 instant motion does not include a copy of the Arizona PCR court's disposition of Claim 16.

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22 ¹ Judge Maloney was convicted of racketeering based on evidence that he
23 accepted bribes from criminal defendants, including murder defendants, around the time
24 Petitioner's case was tried. *See United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995); *see*
also Bracy v. Gramley, 520 U.S. 899 (1997).

25 ² Subsequent to this Court's Order, in *Rhines v. Weber*, 544 U.S. 269, 277
26 (2005), the Supreme Court modified a district court's ability to stay a mixed habeas petition
27 when litigating under the AEDPA. The Court held that a district court has discretion to stay
28 a mixed habeas petition and allow a petitioner to exhaust state court remedies so long as there
is a determination of good cause for the failure to first exhaust state court remedies and that
the unexhausted claims are not plainly meritless.

1 Nor does the motion address the applicable standard for amendment.

2 A petition for habeas corpus may be amended pursuant to the Federal Rules of Civil
 3 Procedure. 28 U.S.C. § 2242; *see also* Rule 11, Rules Governing § 2254 Cases, 28 U.S.C.
 4 foll. § 2254 (providing that the Federal Rules of Civil Procedure may be applied to habeas
 5 petitions to the extent the rules are not inconsistent with the habeas rules). Thus, the Court
 6 looks to Rule 15 of the Federal Rules of Civil Procedure to address a party's motion to
 7 amend a pleading in a habeas corpus action. *See Calderon v. United States Dist. Ct. for the*
 8 *N. Dist. of Cal.*, 134 F.3d 981, 986 n.6 (9th Cir. 1998) (citing *Withrow v. Williams*, 507 U.S.
 9 680, 696 n.7 (1993)). Under Rule 15, leave to amend "shall be freely given when justice so
 10 requires," Fed. R. Civ. P. 15(a), and courts must review motions to amend "in light of the
 11 strong policy permitting amendment." *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d
 12 762, 765 (9th Cir. 1986).

13 The factors which may justify denying a motion to amend are undue delay, bad faith
 14 or dilatory motive, futility of amendment, and undue prejudice to the opposing party. *Foman*
 15 *v. Davis*, 371 U.S. 178, 182 (1962). Leave to amend may be denied based upon futility
 16 alone. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). To assess futility, a court
 17 necessarily evaluates whether relief may be available on the merits of proposed claims. *See*
 18 *Caswell v. Calderon*, 363 F.3d 832, 837-39 (9th Cir. 2004) (conducting a two-part futility
 19 analysis reviewing both exhaustion of state court remedies and the merits of the proposed
 20 claim); *Stafford v. Saffle*, 34 F.3d 1557, 1560 (10th Cir. 1994) (reviewing the evidence
 21 presented at trial and determining it would be futile to allow the addition of a sufficiency of
 22 the evidence claim).

23 Under *Caswell*, this Court may not grant leave to Petitioner to add Claim 16 if it is
 24 plainly meritless. Unfortunately, the instant motion fails to address the standard for
 25 amendment, and it is unclear whether amendment is appropriate.³ Consequently, if Petitioner
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27 ³ As previously ordered, once Petitioner completed exhaustion of Claim 16, he
 28 may, if appropriate, "move this Court for leave to amend his petition." (Dkt. 55 at 3.)
 However, before this Court may grant leave to amend, the standard for amendment must be

1 desires to add Claim 16 to his amended petition, he must refile his motion and address these
2 standards for seeking leave to amend his amended petition.

3 Accordingly,

4 **IT IS HEREBY ORDERED** denying, without prejudice to refile, Petitioner's motion
5 for leave to amend his habeas petition to add Claim 16 and denying Petitioner's request for
6 a briefing schedule regarding this Claim. (Dkt. 102.)

7 DATED this 4th day of December, 2006.

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11 Stephen M. McNamee
12 United States District Judge
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satisfied.